UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/701
28 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 701

Case No. 763: KHUBCHANDANI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 5 February 1988 and again on 13 April 1988, Jairam G. Khubchandani, a staff member of the United Nations Development Program (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 30 September 1988, 15 June 1990, 30 September 1990, 31 March 1991, 30 November 1991, 28 February 1992, 31 May 1992, 31 August 1992, 31 July 1993, and 31 October 1993;

Whereas, on 28 October 1993, the Applicant, after making the necessary corrections, filed an application which, after requesting the Tribunal to take certain decisions on its competence and procedures, requests the Tribunal:

> "(a) To find that the management of UNDP did not act in good faith by refusing to make good the commitment to review the Applicant's performance within the one year that he was assigned to a new section;

(b) To find that Applicant's within grade increment was unjustly withheld and that the procedures involved in withholding the increment did not follow procedural norms and therefore denied him his due process rights;

(c) To find that this mismanagement of his increment has proven prejudicial to his career;

(d) To find that, in the process of investigation reviewing the case, the JAB failed to exercise its jurisdiction and therefore;

(e) To find that the JAB proceedings and final recommendations are invalid since the Board did not fulfil its obligation in addressing the substance of the appeal properly before it;

(f) To find that the implications of the recommendation made by the Joint Appeals Board, without addressing the substance of the appeal, constitutes violation of due process and further erodes the confidence in an already faltering appellate system;

(g) To order the Respondent to rescind his decision to deny the Applicant the increment and further;

(h) To award the appropriate amount of compensation payable to him for the one year increased increment as well as any the Tribunal deems appropriate and for the injury sustained by him from the lack of due process and the irreparable damage done to his career;

(i) To order that he be given serious consideration for a retroactive promotion;

(j) Or to award appropriate compensation in lieu of a promotion."

Whereas the Respondent filed his answer on 25 May 1994;

Whereas the Applicant filed written observations on 25 July 1994;

Whereas the Applicant amended his pleas and submitted additional documents on 17 May 1995;

Whereas, on 12 July 1995, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in India, on 21 December 1967, as a Secretary/Stenographer in the International Recruitment Section. On 2 February 1981, the Applicant was transferred to the Programme Section, as Secretarial/Programme Assistant. On 21 November 1983, he was transferred to the Customs and Travel Section, as Customs and Travel Assistant.

On 23 January 1981, the Applicant was informed that he would be transferred from the International Recruitment Section to the Programme Section. In a letter dated 27 January 1981, to the UNDP Resident Representative, the Applicant expressed concern over the transfer, noting his "keen desire to specialize and develop my skills in International Recruitment". He pointed out that Office Circular 582, of 5 September 1980, stated that the wishes of staff members would be taken fully into account with respect to their redeployment, and he stated: "[I] trust you will give me the opportunity of remaining in the International Recruitment Section."

On 2 February 1981, the Applicant was transferred to the Programme Section, as Secretarial/Programme Assistant. In his performance review and staff development report (PRR), covering the period from January 1980 through January 1981, the Applicant was given an overall rating of a "competent and well-qualified staff member whose performance meets expected standards." In a comment on the report, dated 2 September 1981, the Resident Representative noted:

> "[The Applicant] should be encouraged to develop his skills in programming in order to become [a] more versatile staff member. It is recommended that in about one year's time staff member's work should be further evaluated to determine whether he should continue in programming or be assigned to other work."

The Applicant was next evaluated in a PRR he received on 24 June 1983, covering the period February 1981 through January 1983. He was given an overall rating of a "staff member whose performance does not meet expected standards in all respects." On

21 July 1983, the Applicant submitted a rebuttal to the PRR. On 19 September 1983, an ad hoc panel was appointed to consider the Applicant's rebuttal.

On 16 September 1983, the Resident Representative informed the Applicant that his within-grade salary increment, due from 1 October 1983, would not be granted because his performance did "not meet expected standards." On 19 September 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB), regarding his PRR and the decision to withhold his within-grade salary increment.

On 29 September 1983, the ad hoc panel considering the Applicant's rebuttal submitted its report to the Resident Representative, concluding that the ratings were fair and should stand. The panel also noted that a review of the Applicant's performance one year after he joined the Programme Section, although not stipulated in the UNDP Personnel Manual, would have given the Applicant a more appropriate indication of the standards required of him by the Section.

On 30 September 1983, the Applicant contested the recommendation not to grant him his within-grade salary increment, due 1 October 1983. On 21 December 1983, the Applicant again lodged an appeal with the JAB.

On 17 August 1984, the Senior Policy Officer (Legal), Division of Personnel, UNDP, advised the Applicant that the report of the ad hoc panel to investigate his rebuttal of his PRR had been considered and its findings and recommendation upheld. In a letter of the same date, he also requested the Resident Representative to appoint an ad hoc panel to investigate the Applicant's rebuttal of the recommendation to withhold his within-grade salary increment which would been due 1 October 1983. This panel was appointed on 12 September 1984. On 17 October 1984, the Assistant Resident Representative informed the Applicant that he had been awarded a within-grade salary increment, with effect from 1 October 1984.

On 1 February 1985, the panel to investigate the withholding of the Applicant's within-grade salary increment submitted its report to the Resident Representative. It concluded that although

the notice requirement and the special report format set forth in Section 20704 of the UNDP Personnel Manual had not been strictly adhered to, the Applicant's interest had been respected in terms of the process and the recommendation to withhold the increment should stand. On 22 April 1985, the Senior Policy Officer (Legal), Division of Personnel, UNDP, informed the Applicant that the panel's recommendation had been accepted.

On 22 October 1987, the JAB adopted its report on the Applicant's appeal. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 42. The Panel concludes that there was no indication that the Administration was influenced by prejudice or some other extraneous factors in preparing the appellant's PRR covering the period February 1981 to January 1983 and in withholding the appellant's within-grade salary increment which fell due on 1 October 1983.
>
> 43. The Panel also concludes that although the Administration did not strictly comply with the requirements of the two-month prior notice and the format of the special report called for in Volume I of UNDP Personnel Manual, the appellant was accorded due process.
>
> 44. Accordingly, the Panel makes no recommendation in favour of the appeal."

In a letter dated 22 December 1987, the Assistant Secretary-General for Human Resources Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided "to maintain the contested decisions and to take no further action on your appeal."

On 5 February 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration failed to honour its commitment to the Applicant that within one year following reassignment, his work

would be reviewed to determine whether he should continue or be reassigned elsewhere.

2. The decision of the Administration to withhold the Applicant's within-grade salary increment was not made in accordance with the applicable staff rules, which require two months' notice and a special report.

Whereas the Respondent's principal contentions are:

1. Assignment of the Applicant to a new post was within the discretionary authority of the Administration and did not violate his rights.

2. The preparation of the Applicant's PRR, covering the period from February 1981 to January 1983, and the decision to withhold his within-grade salary increment, due on 1 October 1983, were not vitiated by prejudice or any other extraneous factors.

The Tribunal, having deliberated from 12 to 27 July 1995, now pronounces the following judgement:

I. In the pleas submitted to the Joint Appeals Board (JAB), the Applicant challenged his performance review and staff development report (PRR) covering the period from February 1981 to January 1983. He also challenged the withholding of his within-grade salary increment due on 1 October 1983 and requested the removal of his challenged PRR from his official status files. During the course of the proceedings the Applicant submitted other pleas to the Tribunal. Although it is not altogether clear whether his pleas before the Tribunal fully coincide with his pleas before the JAB, the special circumstances of the case justify resolving any doubts in the Applicant's favour. The Tribunal will therefore address all of the Applicant's pleas.

II. The Applicant claims that the management of UNDP did not act in good faith by refusing to make good its commitment to review the

Applicant's performance within one year of his assignment to a new section. In addition, the Applicant claims that his within-grade salary increment was unjustly withheld and that the decision to withhold the increment was not made in accordance with procedural requirements and therefore denied him due process as well as proving prejudicial to his career. He requests that appropriate compensation be awarded to him due to injury he sustained from the lack of due process and the irreparable damage done to his career.

III. The central issues in this case are whether the preparation of the Applicant's PRR was influenced by prejudice or some other extraneous factors, and whether withholding the Applicant's within-grade salary increment, as a result of his unsatisfactory performance, violated his rights.

IV. The Tribunal agrees with the Respondent that the reassignment of the Applicant to a new post was within the discretionary authority of the Secretary-General. Staff regulation 1.2 states:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations."

V. The Tribunal notes that a staff member's career aspirations must be considered when reassignment is contemplated, and appreciates that the Applicant had the motivation and initiative to take positive steps to advance his career in the International Recruitment Section, the Section in which he wished to remain. However, ultimately, the best interest of the Organization must prevail when reassignments are determined. These two factors are explicitly referred to in office circular No. 582, on reassignment of staff:

> "... Nevertheless, the wishes of the staff in this regard will be taken fully into account in the deployment of staff members to the various sections in the best interests of the Organization."

The Tribunal considers that the Applicant's transfer was made in good faith and was seen by the Administration as potentially beneficial for both the Applicant and the Organization.

VI. The Applicant argues that his performance report should have been produced within a year. The Tribunal accepts that there was a recommendation that "in about one year's time" the Applicant's work should be evaluated. This evaluation was carried out one year and nine months later; the Tribunal considers that this time frame was reasonable. There is no legal basis for asserting that the evaluation of the staff member's work must have been undertaken exactly after one year. In fact, the UNDP Personnel Manual (section 20701) provides that a PRR should be prepared "every two years for staff members holding permanent appointments".

VII. The Applicant claims that by not following proper procedure, the Administration denied him his due process rights. The Tribunal agrees that the Administration did not strictly comply with the procedural requirement of two-months prior notice when withholding within-grade salary increments, as set forth in the UNDP Personnel Manual (section 20300 paragraph 5.0). For this, he is entitled to some compensation which the Tribunal assesses at $1,500.

VIII. Th Tribunal notes that there is a procedure for recourse if a staff member believes his PRR is unjustified. The Applicant was given ample opportunity to challenge the findings of the Administration. In this respect, the Tribunal finds that the Applicant's due process rights were not denied.

IX. The Tribunal does not accept the Applicant's claim that the withholding of his increment was prejudicial to his career and caused irreparable damage to his chances for advancement. The Applicant himself submits in his application "that one year later the Applicant's increment was approved and he was subsequently transferred to another section with much better evaluation results".

X. As the Tribunal is of the view that the Applicant has failed to prove prejudice or improper motivation on the part of the Administration, or the existence of any other extraneous factors which would engage the responsibility of the Organization, it considers that there is no basis for or merit in his claim. (Cf. Judgement No. 93, Cooperman (1965)).

XI. Based on the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant $1,500 with respect to the procedural failure related to notice of withholding the within-grade salary increment. The Tribunal rejects all other claims.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 27 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary